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July 1, 1988

Mr. Ray Helmick, Director
Department of Weights and Measures
1951 West North Lane
Phoenix, Arizona 85021

Re: I88-077 (R88-044)

Dear Mr. Helmick:

You have asked whether a provision that requires the approval of the Joint Legislative Budget Committee ("JLBC") prior to the implementation of a legislatively mandated program violates the separation of powers doctrine. You also ask whether the provision, if offending, is severable from the remainder of the legislation dealing with the duty to implement the program. We conclude that the provision does violate Article III of the Arizona Constitution and that it is severable from the remaining provisions related to the program.

Your questions arise out of Laws 1987 (1st Reg. Sess.) Ch. 314, § 18 which states:

> The department shall develop and implement a pilot program to contract with private firms to provide weights and measures services. The implementation plan and details of the pilot program shall be presented to the joint legislative budget committee no later than August 1, 1987, for approval. The pilot program shall be implemented no later than thirty days after approval by the joint legislative budget committee. The director shall report to the president of the senate and the speaker of the house of representatives no later than December 31, 1988 on the effectiveness of the pilot program.

(Emphasis added.)

Your first question is whether the underscored portion of the legislation violates Article III of the Arizona Constitution, which provides:

DISTRIBUTION OF POWERS

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

A violation of the doctrine of separation of powers occurs when the exercise of the same type of powers by more than one department significantly interferes with the operations of the department to which the power properly belongs. Ariz.Atty.Gen.Op. I87-107. See J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors, 142 Ariz. 400, 690 P.2d 119 (App. 1984).

The test for determining whether one branch of government is exercising "the powers properly belonging to either of the others" as prohibited by art. III was set forth in the Hancock case:

> When a statute is challenged under the constitutional doctrine of separation of powers, the court must search for a usurpation by one department of the powers of another department on the specific facts and circumstances presented.
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> . . . .
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> It seems to us that to have a usurpation of powers there must be a significant interference by one department with the operations of another department. In determining whether or not an unconstitutional usurpation of powers exists, there are a

> number of factors properly to be considered. First is the essential nature of the power being exercised. Is the power exclusively executive or legislative or is it a blend of the two? A second factor is the degree of control by the legislative department in the exercise of the power. Is there a coercive influence or a mere cooperative venture? A third consideration of importance is the nature of the objective sought to be attained by the legislature. Is the intent of the legislature to cooperate with the executive by furnishing some special expertise of one or more of its members or is the objective of the legislature obviously one of establishing its superiority over the executive department in an area essentially executive in nature? A fourth consideration could be the practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available. We do not wish to imply that these are the only factors which should be considered but it seems to us that they have special significance in determining whether a usurpation of powers has been demonstrated.

J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors, 142 Ariz. at 405, 690 P.2d at 124, quoting from State ex rel. Schneider v. Bennett, 219 Kan. 285, 290-291, 547 P.2d 786, 792-793 (1976).

The first factor to consider in applying the Hancock test is the nature of the power at issue. In the case of the pilot program the power at issue is the power to develop the details of a program to contract with private firms for weights and measures services. This is the power of rule-making. We are assisted in this classification by A.R.S. § 41-2065(E) which was adopted in the same bill as the pilot program section and refers to the substance of it. A.R.S. § 41-2065(E) provides, in part, as follows:

> All testing and inspection conducted pursuant to subsection A, paragraphs 10 through 14 and subsection B shall, to the

> extent practicable, be done without prior notice and by a random systematic method determined by the director. The testing and inspection may be done by private persons and firms pursuant to contracts entered into by the director in accordance with chapter 23 of this title. The director shall establish, by rule, qualifications of persons and firms for selection for purposes of this subsection.

(Emphasis added.) The qualitative and procedural details of a program to contract for weights and measures services with private persons or firms must be spelled out by rule. A.R.S. §§ 41-1001(12); 41-1003.

Rule-making has been categorized by several courts as an exclusively executive function. E.g. I.N.S. v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W.Va. 1981). The Chadha court stated that executive power and not legislative power is being exercised when an executive branch agency makes rules under statutory authority. Chadha, 462 U.S. at 953 n. 16, 103 S.Ct. at 2785 n. 16, 77 L.Ed.2d at 346 n. 16. The Arizona Supreme Court, however, has referred to rule-making as a "quasi-legislative" power. State v. Arizona Mines Supply Co., 107 Ariz. 199, 484 P.2d 619 (1971). The court stated:

> Under the doctrine of "separation of powers" the legislature alone possesses the lawmaking power and, while it cannot completely delegate this power to any other body, it may allow another body to fill in the details of legislation already enacted. Since the power to make a law includes discretion as to what it shall be, this particular power cannot be delegated. But the decisions display an increasing tendency, due to the complexity of our social and industrial activities, to hold as nonlegislative the authority conferred upon commissions and boards to formulate rules and regulations and to determine the state of facts upon which the law intends to make its action depend.

107 Ariz. at 205, 484 P.2d at 625 (emphasis added).

We recognize the trend toward characterizing rule-making power as exclusively executive in nature. However, we conclude that rule-making, at least in Arizona, is in a grey area which is neither purely legislative nor purely executive in character. Thus, the first factor is of little assistance in determining constitutionality.

The second factor to be considered in applying the Hancock test is the degree of control by the legislative branch in the exercise of the rule-making power by the executive branch. Section 18 gives the JLBC the power to veto any program presented to it. Laws 1987 (1st Reg. Sess.) Ch. 314, § 18. Implementation of the program which the department is mandated to develop and implement is conditioned on JLBC approval. There can be no greater degree of control over the executive's exercise of the rule-making function. As the court stated in the Manchin case:

> In effect, the Legislature abdicates in favor of the executive its power to make rules and then asserts that because the rule-making power so delegated is legislative in nature, it may step into the role of the executive and disapprove or amend administrative regulations free from the constitutional restraints on its power to legislate. The statutory scheme brings to mind the Old Testament quotation from Job I:21, "The Lord gave, and the Lord hath taken away." The Legislature at one time created and delegated powers and responsibilities to the Department of Mines and at a later time attempted to take away some of those important powers and responsibilities and to lodge them in the hands of the Legislature and its personnel. Such a mechanism for legislative review of executive action may properly be called an "extra-legislative control device" for it permits the Legislature to act as something other than a legislative body to control the actions of the other branches. This is in direct conflict with our constitutional requirement of separation of powers.

279 S.E.2d at 633. Thus the second factor weighs against the constitutionality of the provision.

The third factor to consider in applying the Hancock test is the nature of the objective sought to be attained by the legislature in requiring JLBC approval of the department's pilot program. There is no indication of a legislative motive to cooperate by furnishing some special expertise in the field of private weights and measures services. The objective seems to be to establish legislative oversight of a new executive agency and a new program. This factor weighs against the constitutionality of the approval provision.

The final factor in the Hancock test is the practical result of the blending of powers. Although we have no history from which to determine the practical result as a matter of record, the effect is clear. The legislative branch, through the JLBC, is empowered to exert a coercive influence on the executive's exercise of the power already delegated to it by the legislature as a body. This factor, too, weighs against the constitutionality of the provision. We conclude that the legislature may not constitutionally reserve to a legislative committee the power to veto individual rules enacted by an executive agency pursuant to properly delegated statutory authority. Such a reservation of approval authority violates the separation of powers provision of the Arizona Constitution.[1/]

We turn now to whether the offending portion of the legislation is severable from the remainder of the legislation

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[1/] The provision also violates the principle of bicameralism and the presentation clause. Bicameralism is a restraint on legislative power embodied in Ariz. Const. art. IV, Pt. 2, § 15 which vests the legislative power in a two-house body and requires that all bills be adopted by a majority of each house. Ariz.Atty.Gen.Op. I87-107 n. 4. See In re Karcher, 190 N.J.Super. 197, 462 A.2d 1273, 1280 (1983); State ex rel. Schneider v. Bennett, 219 Kan. 285, 547 P.2d 786, 799 (1976). The presentation clause requires the legislature to submit all bills to the governor for approval or veto. Ariz. Const. art. IV, Pt. 2, § 12 and art. V, § 7. The provision at issue would circumvent this step in the legislative process and thus violates the presentation clause. See Legislative Review of Agency Rules in Arizona: A Constitutional Analysis, 1985 Arizona State Law Journal, Vol. 2, p. 493.

relating to the use of private firms and persons for contractual services by the department. The test for severability of constitutional from unconstitutional portions of statute is one of ascertaining legislative intent. E.g. State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978). An entire statute should not be declared unconstitutional if constitutional portions can be separated. Cohen v. State, 121 Ariz. 6, 588 P.2d 299 (1978). If the remaining sections make sense in expressing the intent of the legislature, the offending portions are severable. State v. Book-Cellar, Inc., 139 Ariz. 525, 679 P.2d 548 (App. 1984).

It is evident that the remaining portions of Section 18 together with A.R.S. § 41-2065(E) create a workable, sensible scheme for development and implementation of a program for using private entities to perform services for the department. Section 18 directs the department to develop and implement such a program and to report on its effectiveness to the legislative leaders. A.R.S. § 41-2065(E) contains the guidelines for development and implementation. First, the director must promulgate rules concerning the qualifications and procedures for selection of contractors under the program. A.R.S. § 41-2065(E); A.R.S. §§ 41-1001 to -1055. Second, the contracts must be entered in conformity with the Arizona Procurement Code. A.R.S. § 41-2065(E); A.R.S. §§ 41-2501 to -2652. Within the Administrative Procedures Act and the Procurement Code are ample safeguards and guidelines. We, therefore, cannot conclude that the legislature intended that the pilot program would not go forward unless there was JLBC involvement. The remaining statutes are sensible and workable, and therefore severable from the approval provision.

We conclude that the provision for JLBC approval of the details of the pilot program violates Article III of the Arizona Constitution and that such provision is severable from the remaining legislation dealing with the pilot program.

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

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